IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, DEPARTMENT OF FINANCE,

Plaintiff,

vs.

LOUISE MARTINEZ SCHNEIDER,

Defendant.

Case No. CV OC 9601797D

DECISION AND ORDER

This case involves issues of state securities regulation. The complaint in this matter was filed by the State of Idaho, Department of Finance (the Department) against the Defendant Louise M. Schneider (Schneider). The complaint alleges numerous violations of the Idaho Securities Act.

This matter is presently before the Court on three different motions: (1) the Department's motion to strike Defendant's request for a jury trial; (2) Schneider's motion to strike statements submitted by Plaintiff; and (3) the Department's motion for summary judgment on the first four counts of its complaint. Not before the Court at this time is the Department's

motion to dismiss Schneider's counterclaim, because, at Schneider's request, the counterclaim was dismissed without prejudice. Because the determination of the motion for summary judgment is dependent in part on the outcome of the other motions, those motions will be addressed first.

I. REQUEST FOR JURY TRIAL

The right to a trial by jury is secured by Article 1, § 7, and Article 5, § 1 of the Idaho Constitution, and by I.R.C.P. 38(a). *Thomas v. Schmelzer*, 118 Idaho 353, 361, 796 P.2d 1026 (Ct. App. 1990). However, these provisions simply preserve the right as it existed at common law. *Id.* Consequently they do not extend the right of trial by jury to actions solely involving equity issues. *Id.* The question in this case is whether the issues involved are legal issues or equitable issues.

The Department has requested the following relief in this action: a judgment that Schneider violated the Idaho Securities Act and rules promulgated thereunder; an injunction against further violations of the Act; an order prohibiting Schneider from claiming any exemption under the Act without the prior written consent of the Director; an order of restitution; and an award of attorney fees and costs. The Department is not seeking an award of a civil penalty. The entire relief sought by the Department is equitable in nature. No right to a jury trial exists in regulatory enforcement actions, such as the present one, where the regulatory agency seeks only equitable remedies

such as an injunction and the disgorgement of profits. *See SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993). The fact that the Department is also seeking an award of attorney fees and costs does not change this result. *See Wheeless v. Gelzer*, 765 F.Supp. 741, 744 (N.D.Ga. 1991)(the mere inclusion of a request for attorney fees where the plaintiff's other claims are exclusively equitable in nature does not entitle the defendant to a jury trial pursuant to the Seventh Amendment).

The only non-equitable issues in the case were raised by Schneider's counterclaim which she withdrew. The only issues remaining are equitable issues. For this reason, the Department's motion to strike the request for a jury trial is granted.

II. MOTION TO STRIKE WITNESS STATEMENTS

In support of its motion for summary judgment, the Department has submitted the transcripts of the sworn investigative testimony of five witnesses, including Schneider. The testimony is quite extensive. The testimony was taken under oath by a court reporter in a manner similar to a deposition. Schneider was represented by counsel during the taking of her testimony. Schneider's counsel was not present at the taking of the statements from the other four persons.

Schneider has filed a motion to strike the investigative testimony submitted by the Department. Schneider points out that under I.R.C.P. 56(c), summary judgment may be rendered if "the

pleadings, depositions, and admissions on file, together with the affidavits, if any" show that there is no genuine issue of a material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). Schneider's motion is based on the argument that the investigative testimony submitted is not a pleading, a deposition, an admission, or an affidavit.

If the admissibility of evidence presented in support of or in opposition to a motion for summary judgment is raised by the Court on its own motion or on objection by one of the parties, the Court must first make a threshold determination as to the admissibility of the evidence before proceeding to the ultimate issue, whether summary judgment is appropriate. *Ryan v. Beisner*, 123 Idaho 42, 45, 844 P.2d 24 (Ct. App. 1992). If the evidence would not be admissible at trial, the court will not consider the evidence in ruling on the motion for summary judgment. *Id.* The Court agrees that the investigative testimony submitted could not be considered to be a pleading nor would it precisely fall within the definition of a deposition since Schneider's counsel was not present. However, the testimony while in a different form, certainly has all of the characteristics of an affidavit: sworn testimony providing facts admissible in evidence which is presented in written form based upon the affiant's personal knowledge.

To answer the question posed by Schneider whether the form of an affidavit is satisfied by the investigative testimony, both

the rule of civil procedure and the statute concerning affidavits need to be examined. I.R.C.P. 56(e) states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

The Rule sets forth three requirements for testimony presented by affidavit: 1) the testimony must be within the affiant's personal knowledge; 2) the testimony must be admissible in evidence; and 3) the testimony must be given by a witness competent to testify to the facts and opinions stated. No question has been raised about the competence of any of the witnesses.

In addition to I.R.C.P. 56(e), Schneider also cites Idaho Code § 51-109 regarding the forms for notarial acts. This statute sets forth a format for notarized statements, particularly the oath or affirmation which must be administered verbally by a notary public when verifying an affiant's statement. The intent of this statute is to ensure that any matters set forth in a notarized affidavit are sworn to under oath; the intent is not to prescribe a rigid format. Thus, in addition to the substantive requirements stated in I.R.C.P. 56(e), Idaho Code § 51-109 requires that the testimony be given under oath.

In the present case, the investigative testimony of each of the witnesses was given in a question and answer format similar

to a deposition. While the witness was represented by counsel, Schneider's counsel was only present when her testimony was given. Because the testimony was given under oath, it satisfies the requirement of Idaho Code § 51-109. With respect to the requirements set forth in I.R.C.P. 56(e), there is no indication that the testimony offered fails to meet these requirements; moreover, Schneider has not directed the Court to any portions of the testimony that fail to comply with those requirements. *Compare Ryan v. Beisner*, 123 Idaho 42, 844 P.2d (Ct.App. 1992) (Summary judgment precluded where plaintiff raised issue whether the facts relied upon by defendant's expert fire investigator were of a type and sufficiency on which other experts in the field would rely in forming an opinion on the cause of an electrical fire). The testimony has been given by witnesses about factual matters within their own personal knowledge. The testimony is of the type which would be admissible in evidence. There is no reason to believe that any witness is not competent to offer testimony. In fact, the record also contains affidavits submitted by the witnesses from Schneider. The Idaho Rules of Evidence, like the federal rules and those of most states, presumes that all witnesses are competent absent a valid challenge to their competence. I.R.E. 601.

Though the Court has reviewed the investigative testimony which has been submitted by the Department, the Court will not search the evidence on a general allegation of lack of compliance

with I.R.C.P. 56(e). Schneider has failed to point to any specific portions of the testimony that should be deemed inadmissible due to lack of personal knowledge, evidentiary problems, or incompetency of the witness. The actual format of the testimony presented is less important than whether the testimony complies with the substantive requirements set forth in Idaho Code § 51-109 and I.R.C.P. 56(e). Here, the testimony presented was taken under oath and Schneider has failed to point to any portions of the testimony which fail to comply with I.R.C.P. 56(e); therefore, the motion to strike the testimony is denied.

III. MOTION FOR SUMMARY JUDGMENT

A. Standard for Summary Judgment

As this matter will be tried before the Court, under the Idaho Rules of Civil Procedure, summary judgment is appropriate only where there is no genuine issue of material fact after the Court has drawn the most probable inferences from the uncontroverted evidentiary facts and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657 (1982).

B. Factual Background.

The analysis of the motion for summary judgment begins with a statement of the undisputed facts. Schneider was a stockbroker and an art collector. She collected art for herself as an

individual; and, she had an art gallery where she displayed art that she purchased for resale.

Schneider offered various individuals the opportunity to invest in an open inventory of art, including pieces she already owned as well as pieces she intended to purchase on behalf of investors. The individuals gave Schneider money against the eventual sale of the art. Schneider guaranteed some of these individuals a twelve percent (12%) return on their money. For the purposes of this motion for summary judgment, Schneider agrees that the sale of options in her art inventory amounted to an investment contract and therefore a security as defined under Idaho Code § 30-1402(12).

Two of the individuals who gave money to Schneider for investing in art were Lynna Hansen (Hansen) and Linnea Blaser (Blaser). Hansen had recently divorced and was working three part-time jobs. Hansen asked Schneider in April, 1994 about investment of money she received in a divorce settlement. Hansen transferred $35,000 to Schneider in April, 1994. Schneider told Hansen that her money would be lumped in with money from other investors and used to purchase art. The decision to apply the money toward the existing art inventory or to apply it to a specific piece of art was to be in Schneider's discretion.

Before Hansen gave Schneider the money to invest in art, Schneider discussed her general financial situation with Hansen. Hansen also discussed her financial situation with Schneider.

Hansen was aware that Schneider was having financial difficulty at the time she transferred money to her to invest; but Hansen understood that Schneider's difficulties were a result of her brokerage license not being cleared by the Department of Finance. At the time, Schneider was not licensed in the state of Idaho as a securities salesperson or as a broker-dealer. Schneider did not inform Hansen that the $35,000 might be used to pay Schneider's personal and business expenses.

Blaser was referred to Schneider in August 1994 because she desired to invest the proceeds of the sale of some of her property. Blaser, who cleans homes for a living, had divorced and was looking for some safe investments. She had received a considerable sum from the sale of a commercial building owned by her ex-husband and herself. On August 17, 1994, Blaser gave Schneider $45,000 to invest in art; on October 15, 1994, she gave Schneider an additional $25,000 to invest in art. Schneider told Blaser prior to her initial investment that she used income form the art gallery to pay her personal and business expenses. Schneider did not tell Blaser that the money Blaser invested would be directly applied to Schneider's personal and business expenses. Schneider has presented no evidence to account for the money she received from Blaser, nor has she presented evidence to indicate what pieces of artwork she purchased with Blaser's money.

Schneider deposited the money received from investors into a

general bank account. She used the account for business and personal expenses. The money she deposited into the account was used to pay not only her business obligations, but also to pay her personal obligations.

On November 26, 1991, First Security Bank charged off two loans it had made to Schneider: the first loan was in the amount of $188,643.00; the second loan was in the amount of $60,860.42. Schneider entered into two loan workout agreements with First Security regarding these loans, but did not meet the schedule of payments. On April 26, 1993, First Security charged off a bank card balance owed by Schneider of $4,564.68. On July 15, 1993, First Security charged off a balance on a cash reserve card of $511.31. Schneider entered into two subsequent loan workout agreements with First Security, but, again, failed to meet the schedule of payments. As of February 1, 1995, the balance of Schneider's outstanding debt to First Security Bank was in excess of $300,000.00.

The only payments Schneider made on these outstanding debts were made shortly following her receipt of investment money from Hansen and Blaser. On April 26, 1994, Hansen gave Schneider $35,000 to invest in art investment securities. Three days later, on April 27, 1994, Schneider made a $5,000 payment to First Security Bank. This was the first payment Schneider had made in over one year.

On July 14, 1994, Schneider made a payment to First Security

Bank of $3,500.00. On October 15, 1994, Blaser invested $25,000.00 in Schneider's art investment security. Five days later, Schneider made a payment of $13,500.00 to First Security Bank. This was the first payment Schneider had made since July 14, 1994, and was the only payment made between July 14, 1994, and March 1, 1996.

Schneider did not inform either Hansen or Blaser that she was the subject of ongoing loan collection efforts by First Security Bank, of the amount of her personal debt, or that her loans with First Security Bank had been renegotiated four times.

C. Count One: Misrepresentation and Omission of Material Facts.

The Department's first allegation is that Schneider violated Idaho Code § 30-1403(2), which states in pertinent part:

> **Unlawful offers -- Sales -- Purchases.** --It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly,
> . . .
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading
> . . . .

In order to determine whether a violation of this statutory provision occurred, it is necessary to determine whether a misstated or omitted fact is material. Schneider urges the Court to judge materiality by the standard set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

The question whether a misstated or omitted fact is material in the realm of securities law has been considered by the U.S.

Supreme Court in a slightly different context. In *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), a minority stockholder in an acquired corporation brought suit against the acquiring corporation, contending that the acquiring corporation omitted material facts in a joint proxy statement which recommended shareholder approval of the proposed acquisition. The case centered on the question whether the omitted facts were material. With regard to the issue of materiality, the Supreme Court stated:

> The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.

TSC Industries, Inc., 426 U.S. at 449 (Emphasis added). In adopting this standard of materiality, the Supreme Court rejected a formulation of the standard which placed too low a threshold on the issue of materiality: the lower court had concluded that material facts include "all facts which a reasonable shareholder might consider important." *TSC Industries, Inc.*, 426 U.S. at 445. (Emphasis added).

With respect to the question whether the issue of materiality is a question of law or fact, the Supreme Court stated:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the matter is appropriate, we must bear in mind that

> the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment.

TSC Industries, Inc., 426 U.S. at 450. (Emphasis added).

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 899 P.2d 977 (1995), the Idaho Supreme Court considered a securities enforcement action brought by the state. The state alleged, among other things, that one of the general partners in Shama had committed securities fraud on the basis that the securities sold were not registered and because the partner who sold the securities was not a registered broker-dealer. The Court, in affirming a summary judgment in favor of the state, held that these facts were material to the offerees and investors because the information may have resulted in an alteration of the offerees' or investors' investment decision. *Shama*, 127 Idaho at 273.

The undisputed facts establish that Schneider told Hansen that the money Hansen invested would be used to purchase art. It is also undisputed that Schneider used the money for personal and business expenses. Based on the facts presented, the Court also draws the inference that Schneider used money given to her for

investment to make payments on her personal loans. The fact that the money was to be used for personal and business expenses is a material fact. Reasonable minds could not differ on the question whether the fact that investment money would be redirected for personal use might affect the offerees' or investors' investment decision. Schneider's misrepresentation regarding the use of the money is a violation of Idaho Code § 30-1403(2).

Similarly, Schneider omitted material facts when she failed to provide certain information to the persons from whom she solicited investments. These omissions are: a failure to disclose that money given for investment in art would be used to pay personal and business expenses, including outstanding delinquent debts; a failure to disclose that she was the subject of ongoing loan collection efforts by First Security Bank since at least November 1991; a failure to disclose that she owed First Security Bank an amount in excess of $200,000.00; and a failure to disclose that her loans with First Security Bank had been renegotiated four times and that each time Schneider had defaulted on her loan workout agreements. As the Department points out, Schneider had sole control of the money she was given to invest in art by her clients. Funds were diverted from their use for investment to pay her personal debts. The fact that Schneider was insolvent might have affected the offerees' or investors' investment decisions. On this point, the Court finds the Department's authority persuasive: the materiality of

information relating to financial condition, solvency and profitability is not subject to serious challenge. *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) (affirming summary judgment finding that defendant had committed securities fraud by failing to disclose material facts concerning viability of entity in which investors were asked to purchase partnership interest). For this reason, Schneider's omission of facts concerning her financial situation is a violation of Idaho Code § 30-1403(2).

Count Two
Fraud and Deceit Upon Investors

Idaho Code § 30-1403(3) provides in pertinent part:

> **Unlawful offers -- Sales -- Purchases.** --It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly,
> . . .
> (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

In determining whether a violation of this code section occurred, the Court must first look for a definition of what constitutes a fraud or deceit. The Department, which is charged with the responsibility of administering the Idaho Securities Act, has defined these terms through regulation. IDAPA 12.01.08.110 states in pertinent part:

> The terms "dishonest or unethical practices," separately or in any combination thereof, shall include but not be limited to those acts or practices defined herein as deceptive or manipulative. These acts or practices may also . . . "operate as a fraud or deceit" as used in Section 30-1403(3), Idaho Code . . . .

The Department further defines the term "deceptive or manipulative act" as the "making of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." IDAPA 12.01.08.111. The Department's regulations, which they use to interpret Idaho Code § 30-1403(3), incorporate the language of Idaho Code § 30-1403(2); thus, a violation of Idaho Code §30-1403(2) is automatically a violation of Idaho Code § 30-1403(3). Though the interaction between the statutes and the regulations is somewhat circular, Schneider has not challenged the regulatory definitions or their application to the current facts.

The Court has previously held that Schneider violated Idaho Code § 30-1403(2) by making misstatements of material facts concerning the way her investors' money would be used and by omitting material facts from the disclosures she made to the investors. It would be a rare investor indeed who intended his or her investment money to be used, without express permission, to satisfy the personal debts of the person acting as their broker. As a result of the misrepresentations and omissions made by Schneider, she has violated Idaho Code § 30-1403(3).

It should be noted that the Department initially included an allegation that Schneider had violated Idaho Code § 30-1403(3) by obtaining a loan from one of her customers, Wesley Cockman. The Department supported this contention with Cockman's testimony.

In response to the Department's motion for summary judgment, Schneider pointed out that Cockman's testimony raised conflicting inferences. Schneider also submitted an affidavit from Cockman stating that the money he gave to Schneider was for an investment and was not a loan. Because Cockman's testimony and his affidavit create a genuine issue of fact, the Department withdrew its allegation for the purposes of the motion for summary judgment. Therefore, the issue is not before the Court at this time.

Count Three
Transacting Securities Business Without a License

The undisputed facts indicate, and Schneider has conceded, that she was not registered as a broker dealer or as a salesman when she sold the art investment security to Hansen. The Idaho Securities Act requires all persons who offer or sell securities in this state to be licensed as salesmen or as broker-dealers. Idaho Code § 30-1406 states:

> **Registration of broker-dealers, salesmen, investment advisers, investment advisers representatives required.** -- It is unlawful for any person to transact business in this state as a broker-dealer or salesman unless he is registered under this act, and it is unlawful for any broker-dealer or issuer to employ a salesman unless the salesman is registered under this act. . . .

The Department has adopted a regulatory definition of the term "to transact business." IDAPA 12.01.08.300.01 states:

> Transact Business. Idaho Code, Section 30-1406. For purposes of the Act, "to transact business" shall mean to buy or to sell or contract to buy or to sell or dispose of a security or interest in a security for

> value. It shall also mean any offer to buy or offer to sell or dispose of, and every solicitation of clients or of any offer to buy or to sell, a security or interest in a security for value.

Looking at the plain language of the statute in conjunction with the regulatory definition, the relevant inquiry is whether a person is engaged in the buying and selling of securities when that person is not registered as a broker-dealer or as a salesman.

The Act defines the terms broker-dealer and salesman in Idaho Code § 30-1402:

> (2) "Salesman" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities, ...
>
> (3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account. "Broker-dealer" does not include
>
> (a) [an] issuer . . . .

Schneider contends that she was not a salesman or a broker-dealer. She states that she was an issuer and therefore exempt from the registration requirements of Idaho Code § 30-1406.

The Act defines an issuer as "any person who issues or proposes to issue any security, ..." Idaho Code § 30-1402(7). Though Schneider is correct in pointing out that Idaho Code § 30-1406 does not apply to issuers, there is no reason to construe the statute as though it limited an individual from performing more than one function. In other words, a person may

be the issuer of a security and a salesman of the security. The thrust of Schneider's argument seems to be that because she was an issuer, she could not have been a salesman or a broker-dealer.

The Court rejects Schneider's argument. A security will not transfer from the issuer to the investor without a go-between. In this case, Schneider may have issued the securities in question, but she also sold them. Schneider offered and sold investments in art. She was therefore transacting business within the meaning of Idaho Code § 30-1406. Because she was transacting business as a salesman or broker-dealer during a period when she was not licensed, Schneider violated Idaho Code § 30-1406.

Count Four
Offer and Sale of Unregistered Securities

The Act requires that all non-exempt securities being offered or sold must be registered. Idaho Code § 1416 states:

> **Securities required to be registered -- Exceptions. --** It is unlawful for any person to sell or to offer to sell any security in this state, except securities exempt under section 30-1434, Idaho Code, or except securities sold in transactions exempt under section 30-1435, Idaho Code, unless such security is registered by notification, coordination or qualification under this act.

This statute makes it unlawful to sell or attempt to sell any security in Idaho that has not been registered with the Director of the Department of Finance, unless the securities or transaction are exempt from the registration requirement.

In this case, the State has come forward with a prima facie

case showing that Schneider sold securities which were not registered. Schneider concedes that the art investment security was not registered, but contends that the transaction is exempt from registration because the transactions were made pursuant to a limited offer. This exemption is set forth in Idaho Code § 30-1435(1)(i):

> **Exempt transactions.** -- (1) Except as hereinafter in this section expressly provided, sections 30-1416 through 30-1433, inclusive, Idaho Code, shall not apply to; (sic)
> . . .
> (i) any transaction pursuant to a limited offer directed by the offeror to not more than (10) persons in this state other than those designated in paragraph (h) of subsection (1) of this section during any period of twelve (12) consecutive months, whether or not the offeror or any of the offerees is then present in this state, if
>
> (i) the seller reasonably believes that all buyers are purchasing for investment and,
> (ii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer.

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 899 P.2d 977 (1995), the Supreme Court clearly recognized that the burden is on the person asserting the affirmative defense of an exemption under the Idaho Securities Act to establish that exemption in order to defeat a motion for summary judgment which establishes a prima facie case. In order to qualify for the exemption which she claims, Schneider must prove the following: (1) that she made the offers to no more than 10 persons within twelve consecutive months; (2) that she reasonably believed that all the buyers purchased the securities for investment; and (3)

that neither she nor anyone else received a commission or other remuneration, either directly or indirectly, for soliciting any buyer.

The statute itself clearly provides that any person claiming an exemption or exception to registration bears the burden of proving the exemption or exception. Idaho Code § 30-1456. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The question then becomes whether Schneider has established all the elements necessary to show that the securities she sold were exempt from registration.

Schneider must first show that she made the offers to no more than 10 persons within twelve consecutive months. In the present case, Schneider stated in her Second Supplemental Affidavit that she "did not make more than ten offers to persons living in Idaho during any twelve month period." Second Supplemental Affidavit of Louise M. Schneider, p. 2. This statement is adequate to raise an issue of material fact on the first element of the exemption.

With respect to the second prong of the exemption, there is sufficient evidence that Schneider believed that the buyers purchased the securities for investment. Schneider stated in her

first Affidavit that she relied on the following statements from her clients: Ms. Blaser told her that she had a goal of increasing her investment; Ms. Hansen discussed her investment goals with Schneider; and Mr. Cockman said that he wanted long-term growth with some speculation.

Having established the first two elements, Schneider failed to present adequate evidence to raise a question of fact on the third. In her first affidavit, Schneider stated: "At no time did I pay any person any remuneration or compensation for soliciting any prospective buyer." Affidavit of Louise M. Schneider, p. 2. In her second supplemental affidavit, Schneider stated: "The price of the investment was equal to the interest received at the time of the investment and no additional compensation or remuneration of any kind was received by me." Second Supplemental Affidavit of Louise M. Schneider, p. 2. Both affidavits dodge the question of whether Schneider received any remuneration directly *or indirectly*. It does not matter that she did not pay anyone else. Her unrefuted testimony is that she used the investments to pay personal and business expenses and outstanding debts. As to the second conclusory statement, it does not meet the requirements of the rule.

I.R.C.P. 56(e) provides:

> **Form of Affidavits -- Further Testimony -- Defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify

> to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 899 P.2d 977 (1995), the court stated that the requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge. Schneider's statements in her affidavits regarding whether a commission or remuneration was received by her or by anyone else are conclusory. Schneider cannot use investment money for purely personal purposes and still qualify for the limited offering exemption. Because her clients' investment money was used for personal purposes, it was remuneration. Because she received remuneration, she cannot claim the limited offering exemption. Thus, Schneider sold unregistered securities, thereby violating Idaho Code §30-1416.

CONCLUSION

For the reasons set forth above, the Department's motion to strike Defendant's request for a jury trial is granted; Schneider's motion to strike statements submitted by the Department is denied; and the Department's motion for summary judgment on the first four counts of its complaint is granted.

It is so ordered.

Dated this 19th day of June, 1997.

Deborah A. Bail
District Judge